

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

GWENDOLYN LOPER

Plaintiff,

V.

ZIMMER, INC., ZIMMER HOLDINGS,
INC., ZIMMER US, INC. AND ZIMMER
PRODUCTION, INC.,

Defendant.

CIVIL ACTION NO. _____

INDEX OF DOCUMENTS FILED IN STATE COURT

Zimmer, Inc., Zimmer Holdings, Inc., Zimmer US, Inc. and Zimmer Production, Inc., file this Index of Documents Filed in State Court:

- | | |
|------------|---|
| Exhibit 1. | State Court Docket Sheet, dated July 23, 2010. |
| Exhibit 2. | Plaintiff's Original Petition, filed June 24, 2010. |
| Exhibit 3. | Overpayment Disbursement Request. |
| Exhibit 4. | Officer's Return of Service of Citation, Zimmer US, Inc., filed July 6, 2010. |
| Exhibit 5. | Officer's Return of Service of Citation, Zimmer Production, Inc., filed July 8, 2010. |
| Exhibit 6. | Officer's Return of Service of Citation, Zimmer Holdings, Inc., filed July 8, 2010. |
| Exhibit 7. | Officer's Return of Service of Citation, Zimmer, Inc., filed July 8, 2010. |
| Exhibit 8. | Defendant s' Original Answer to Plaintiff's Original Petition, filed July 23, 2010. |

DATED: July 28, 2010

Respectfully submitted,

FULBRIGHT & JAWORSKI L.L.P.

By: Katherine P. Lett
Katherine P. Lett
Texas State Bar No. 24007548
2200 Ross Avenue, Suite 2800
Dallas, TX 75201-2784
Telephone: (214) 855-8000
Facsimile: (214) 855-8200
Email: klett@fulbright.com

Counsel for Defendants
ZIMMER, INC., ZIMMER HOLDINGS, INC.,
ZIMMER US, INC. AND ZIMMER
PRODUCTION, INC.

CERTIFICATE OF SERVICE

The undersigned certifies that on the 28 day of July, 2010, a copy of the foregoing document was served on the following counsel of record by certified mail, return receipt requested:

Michael H. Smith
Daniel J. Smith
Smith & Smith
6300 Ridglea Place, Suite 617
Fort Worth, Texas 76116

Katherine P. Lett
Katherine P. Lett

EXHIBIT 1

236-246337-10

ATTORNEYS

SMITH, MICHAEL H
6300 RIDGLEA PL, STE 617

FORT WORTH, TX 76116

BarID: 00785005TX Ph (817) 877-5750 PLTF

ORDERS OF COURT

Was Steno Used?

A CERTIFIED COPY

ATTEST: 7-23-10

THOMAS A. WILDER
DISTRICT CLERK
TARRANT COUNTY, TEXAS

BY: Steven J. Brown

DEPUTY

TARRANT COUNTY DISTRICT CLERK'S OFFICE
ALL TRANSACTIONS FOR A CASE

JIMSGTM8

Page: 1
Date: 07/23/2010
Time: 15:25

| | | | |
|--|--|------------------------|--|
| Cause Number: 236-246337-10 | | Date Filed: 06/24/2010 | |
| GWENDOLYN LOPER | | ZIMMER, INC., ET AL | |
| | | v | |
| | | s | |
| Cause of Action: DECEPTIVE TRADE PRACTICES | | | |
| Case Status.....: PENDING | | | |

| Filemark | Description | Fee Total | |
|------------|--|-----------|--------|
| 06/24/2010 | PLTF'S ORIGINAL PETITION & JURY DEMAND | NI | 249.00 |
| 06/24/2010 | COURT COST (PAID) trans #1 | Y | 249.00 |
| 06/24/2010 | Citation-ISSUED ON ZIMMER US INC-On 06/25/2010 | NI | 8.00 |
| 06/24/2010 | COURT COST (PAID) trans #3 | Y | 8.00 |
| 06/24/2010 | CIT Cert. Mail Sec of St-ISSUED ON ZIMMER | NI | 58.00 |
| 06/24/2010 | CIT Cert. Mail Sec of St-ISSUED ON ZIMMER | NI | 58.00 |
| 06/24/2010 | CIT Cert. Mail Sec of St-ISSUED ON ZIMMER INC-On | NI | 58.00 |
| 06/24/2010 | COURT COST (PAID) trans #7 | Y | 58.00 |
| 06/24/2010 | COURT COST (PAID) trans #6 | Y | 58.00 |
| 06/24/2010 | COURT COST (PAID) trans #5 | Y | 58.00 |
| 06/24/2010 | OVERPAYMENT | Y | 3.00 |
| 06/24/2010 | Overpayment Disbursement Request-Created on 06/24/ | I | 0.00 |
| 07/21/2010 | REFUND OVERPAYMENT Check # 37296 | Y | -3.00 |
| 07/23/2010 | DEFNS' ORIGINAL ANSWER TO PLTF'S ORIG PETITION | I | 0.00 |

Total Number Of Records Printed: 14

EXHIBIT 2

236 246337 10
NO. _____

GWENDOLYN LOPER,
Plaintiff,

vs.

ZIMMER, INC., ZIMMER HOLDINGS, INC.,
ZIMMER US, INC., and
ZIMMER PRODUCTION, INC.
Defendants

§
§
§
§
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§
§
§

IN THE DISTRICT COURT

OF TARRANT COUNTY, TEXAS

_____ JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION AND JURY DEMAND

Plaintiff, Gwendolyn Loper, files this Original Petition and Jury Demand.

Discovery Control Plan

1. Discovery is intended to be conducted under Level 2 of Texas Rule of Civil Procedure 190.

Parties

2. Plaintiff, GWENDOLYN LOPER, is an individual who resides in Ellis County, Texas. In accordance with Tex. Civ. Prac. & Rem. Code § 30.014, which requires the disclosure of partial identification information for parties to a civil action; the last three numbers of Plaintiff's Texas Driver's License are 151, and the last 3 numbers of Plaintiff's Social Security Number are 482.
3. ZIMMER, INC. is a corporation organized under the laws of the State of Delaware, doing business in the State of Texas, with its principal place of business in Indiana; Zimmer, Inc. does not maintain a regular business in the State of Texas and has no designated agent in this state on whom service of citation may be made in this cause. Zimmer, Inc. may be served with process by and through the Texas Secretary of State who will serve

FILED
TARRANT COUNTY
2010 JUN 24 PM 1:45
THOMAS A. WILDER
DISTRICT CLERK

Zimmer, Inc. by certified mail return receipt requested at Zimmer, Inc. 345 E. Main St., Warsaw, Indiana 46580.

4. Defendant ZIMMER HOLDINGS, INC. is a corporation organized under the laws of the State of Delaware doing business in the State of Texas, with its principal place of business in Indiana; Zimmer, Inc. does not maintain a regular business in the State of Texas and has no designated agent in this state on whom service of citation may be made in this cause. Zimmer Holdings, Inc may be served with process by and through the Texas Secretary of State who will serve Zimmer Holdings, Inc. by certified mail return receipt requested to Zimmer Holdings, Inc. at Corporation Service Company, 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808.
5. Defendant ZIMMER PRODUCTION, INC. is a corporation organized under the laws of the state of Delaware, doing business in the State of Texas, with its principal place of business in Indiana, Zimmer Production, Inc. does not maintain a regular business in the State of Texas and has no designated agent in this state on whom service of citation may be made in this cause. Zimmer Production, Inc. may be served with process by and through the Texas Secretary of State who will serve Zimmer Production, Inc. by certified mail return receipt requested to Zimmer Production, Inc. at Corporation Service Company, 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808.
6. Defendant, ZIMMER US, INC. is a corporation organized under the laws of the State of Delaware, doing business in the State of Texas, with its principal place of business in Indiana; and may be served with process by serving its registered agent for service, Corporation Service Company d/b/a CSC-Lawyers Incorporating Service Company, 211 E. 7th Street, Ste. 620, Austin, Texas 78701-3218.

7. Defendants ZIMMER INC., ZIMMER HOLDINGS, INC., ZIMMER PRODUCTION, INC., AND ZIMMER U.S., shall hereinafter, jointly and severally, be referred to as "Defendants" or "Zimmer."

Jurisdiction

8. The Court has jurisdiction over defendants because they have done and continue to do business in Texas and in so doing so they purposefully avail themselves to the privilege of conducting activities in Texas. The Court has jurisdiction over the controversy because the damages are within the jurisdictional limits of the Court.

Venue

9. Venue is proper in Tarrant County because it is the county in which a substantial part of the events or omissions giving rise to the claims occurred. *See* TEX. CIV. PRAC. & REM. §15.002(a)(1).

Background

10. Defendants were, at the time of this occurrence, and are now engaged in the business of manufacturing, selling, and distributing certain products for use in hip replacement surgeries.
11. On or about June 26, 2008 plaintiff, Gwendolyn Loper, underwent revision right total hip arthroplasty at Plaza Medical Center, Fort Worth, Texas. Surgeon Theodore W. Crofford, M.D. performed the surgery implanting prosthetic devices designed, manufactured and marketed by Zimmer and labeled as below in the body of Plaintiff:

Device 1: Versys ® Hip System
Femoral stem beaded fullcoat collared
12/14 Neck Taper Standard Neck offset
Size: 14 LM Body

LOT: 07886358 EDI: 00784301436 REF: 7843-14-36
Coded: +H124007843014361/1724307886358H07D
2017-08 Zimmer

Device 2: Trilogy ® Acetabular System
Liner Standard
Longevity ® Crosslinked Polyethylene
40 MM I.D. 3.5 MM Offset
For use with 62 MM O.D. Shell
LOT: 60871511 EDI: 00630506240 REF: 6305-62-40
Coded: +H124006305062401/1303160871511A08F
2013-01 Zimmer

Device 3: Versys ® Hip System
Femoral Head 12/14 Taper
40 MM DIA -3.5 MM Neck Length
LOT: 60919272 EDI: 00801804001 REF: 8018-40-01
Coded: +H124008018040011/1809060919272C088U
2018-03 Zimmer

Device 4: Shell with multi holes porous
Trabecular Metal™ Modular Acetabular System
62 MM
LOT: 60912547 EDI: 00620206220 REF: 6202-62-20
Coded: +H124006202062201/1809060912547C08Q
2018-03 Zimmer

Device 5: Bone Screw Self-tapping
6.5 MM 15 MM Length
LOT: 60932040 EDI: 00625006515 REF: 6250-65-15
Coded: +H124006250065151/1812060932040D08L
2018-04 Zimmer

Device 6: Bone Screw self-tapping
6.5 MM DIA 15mm Length
LOT: 60903701 EDI: 00625006515 REF: 6250-65-15
Coded: +H124006250065151/1805960903701B08W
2018-02 Zimmer

Device 7: Bone Screw Self-tapping
6.5 MM DIA 15 MM Length
LOT: 60932040 EDI: 00625006515 REF: 6250-65-15
Coded: +H124006250065151/1812060932040D08L
2018-04 Zimmer

Device 8: Bone Screw Self-tapping

6.5 MM DIA 35MM Length
LOT: 60917676 EDI: 00625006535 REF: 6250-65-35
Coded: +H124006250065351/1805960917676B087
2018-02 Zimmer

12. Following implantation of the above named components, Ms. Loper continued to experience pain at the location of the implant. The pain radiated to her thigh, groin and buttocks. Plaintiff's pain persisted, and plaintiff further began to experience multiple incidents which she described as feeling like the dislocation of her right hip. These incidents continued and became more frequent as time progressed.
13. On January 12, 2009, surgeon Theodore W. Crofford, M.D. performed open reduction internal fixation of Plaintiff's greater trochanter at Plaza Medical Center of Fort Worth, Texas. The procedure repaired a nonunion of her greater trochanter which surgeon, Dr. Crofford, believed to be the source of the dislocation sensation Plaintiff had been experiencing. Plaintiff's pain and the repeated dislocation of her hip persisted in spite of the internal fixation.
14. On December 18, 2009 at Baylor Medical Center in Dallas surgeon Paul T. Freudigman, M.D. removed and replaced devices from the body of Gwendolyn Loper.
15. Defendants were in the business of designing, manufacturing and selling hip prostheses.
16. Defendants sold the hip prosthesis used in Plaintiff's replacement surgeries to Plaintiff, or to her physicians on her behalf.
17. The hip prosthesis reached Plaintiff without substantial change from the time it left Defendant's possession and control.

Strict Liability

For strict liability cause of action against Defendants, Plaintiff says:

18. The Hip Prostheses may have contained a manufacturing, design, or marketing defect, more particularly set forth below.

Manufacturing Defect

19. The Hip Prostheses may have contained a manufacturing defect. Plaintiff has been unable to conduct discovery and investigation into whether the hip prosthesis contained a manufacturing defect.

20. The hip prostheses may have deviated, in their construction or quality, from the specifications or planned output. As more particularly set forth below, Plaintiff invokes the doctrine of res ipsa loquitur as to whether the hip prostheses contained a manufacturing defect.

Marketing Defect

21. The hip prostheses contained one or more marketing defects, among others:
- (a) there was an inherent risk in the intended or reasonably foreseeable use of the hip prostheses that it could become loose;
 - (b) Defendants knew or reasonably foresaw (or should have known or reasonably foresaw) the above risk;
 - (c) Defendants failed to warn or adequately warn Plaintiff or her physicians of the above risk, failed to instruct or adequately instruct Plaintiff or her physicians how to safely use the hip prostheses, or both.

Design Defect

22. The hip prostheses contained one or more of the following design defects, among others:
- (a) they were unreasonably dangerous for their intended purpose because they had the propensity to become loose;
 - (b) the hip prostheses were defective in that they had a high propensity of poor bone fixation to occur;
 - (c) the hip prostheses were defective in that they have a high propensity for wear and fracture of the prostheses to occur;

- (d) the hip prosthesis were marketed in such a way as to mislead consumers regarding their safety and efficacy;
 - (e) the hip prostheses were manufactured without adequate quality controls; and,
 - (f) the hip prostheses were inadequately tested to determine the cause of the high incidence of failures despite having received significant reporting of adverse events with the model
23. A safer alternative design for the hip prostheses existed that would have prevented or significantly reduced the risk of Plaintiff's injury without substantially impairing the product's utility, and that was economically and technologically feasible at the time the hip prostheses left Defendant's control by the application of existing or reasonably achievable scientific knowledge.

Unreasonably Dangerous

24. The manufacturing and marketing defects, or any of them, rendered the hip prostheses unreasonably dangerous by making the hip prostheses dangerous to an extent beyond that which would be contemplated by the ordinary consumer with the knowledge common to the community as to its characteristics.
25. The design defect or defects rendered the hip prostheses unreasonably dangerous as designed considering the utility of the hip prostheses and the risks involved in its use.
26. The above defects, or any of them, were the producing causes of Plaintiff's injuries and damages as set forth below.

Negligence

For negligence cause of action against Defendant, Plaintiff says:

27. Defendants owed Plaintiff a duty of reasonable care. Defendants owed Plaintiff a duty to exercise reasonable care to discover dangerous propensities of the hip prostheses.

Defendants owed Plaintiff a duty to exercise ordinary care in the design, production (manufacture) and sale (marketing) of the hip prostheses.

28. Defendants breached the duties they owed Plaintiff, failed to exercise ordinary care, and were negligent in the following particulars, among others:

- (a) designing, manufacturing, and marketing a hip prosthesis that is defective in that it has a high propensity of poor bone fixation to occur;
- (b) designing, manufacturing and marketing a hip prosthesis that is defective in that it has a high propensity for wear and fracture of the prostheses to occur;
- (c) failing to warn consumers in general, and Plaintiff or her physicians specifically, of the risk that the hip prostheses could become loose;
- (d) failing to adequately warn consumers in general and Plaintiff or her physicians specifically, of the risk that the hip prostheses could become loose;
- (e) failing to instruct consumers in general, and Plaintiff or her physicians specifically, of how to safely use the hip prostheses;
- (f) failing to adequately instruct consumers in general, and Plaintiff or her physicians specifically, of how to safely use the hip prostheses; and,
- (g) as more particularly set forth below, Plaintiff invokes the doctrine of res ipsa loquitur.

Res Ipsa Loquitur

As each basis for application of res ipsa loquitur to this lawsuit, Plaintiff says:

29. The character of the incident made the basis of this lawsuit was such that it would not ordinarily occur without negligence; and

30. The hip prosthesis was under the management and control of Defendants. Defendants were in control of the hip prostheses at the time that the negligence (inferable from the incident made the basis of this lawsuit) occurred, so that the reasonable probabilities point to the Defendant and support a reasonable inference that Defendants were the negligent party.
31. Defendants have superior knowledge or means of information to determine the cause of the incident made the basis of this lawsuit.
32. By reason of the above and foregoing circumstances, among others, the jury is permitted to infer Defendants' negligence.

Texas Deceptive Trade Practices Act (DTPA)

For Texas Deceptive Trade Practices Act (DTPA) cause of action against Defendants,
Plaintiff says:

33. Plaintiff, or her physicians on her behalf, sought or acquired by purchase the hip prostheses,

False, Misleading, or Deceptive Act or Practice

34. Defendants used or employed one or more of the following deceptive acts or practices, among others:
- (a) representing that the hip prostheses had characteristics, ingredients, uses, or benefits it did not have;
 - (b) failing to disclose information regarding the hip prostheses which was known at the time of the transaction with the intent to induce consumers in general, and Plaintiff or her physicians specifically, into a transaction consumers in general, and Plaintiff or her physicians specifically, would not have entered into if Defendants had disclosed the information.

35. Plaintiff, or her physicians on her behalf, relied on the above representation, failure to disclose, or both, to Plaintiff's detriment.

Breach of Warranty

36. Defendants breached one or more of the following express or implied warranties, among others:

(a) the implied warranty of merchantability

- (1) Defendants sold the hip prosthesis to Plaintiff, or to her physician on her behalf;
- (2) the hip prostheses were unmerchantable in being fit for their ordinary purposes. The hip prostheses lacked something necessary for adequacy in that they failed to accomplish the purposes for which they were manufactured, or in being construction in a manner that rendered them unreasonably dangerous.

Producing Cause

37. The foregoing conduct was a producing cause of Plaintiff's injuries and damages, more particularly set forth below.

Knowing Conduct

38. Defendant engaged in the foregoing conduct knowingly;
39. Defendant was actually aware, at the time of the above conduct, of the falsity, deception, or unfairness of such conduct. Tex. Bus. & Comm Code §17.45 (9);
40. Defendant was actually aware of the act, practice, condition, defect, or failure constituting the breach of warranty. Tex. Bus. & Comm Code §17.45 (9);

Intentionally

41. Defendant engaged in the foregoing conduct intentionally.
42. Defendant was actually aware of the falsity, deception, or unfairness of the above conduct or the condition, defect, or failure constituting a breach of warranty, and specifically intended that Plaintiff, or her physicians on her behalf, act in detrimental reliance on the falsity or deception or in detrimental ignorance of the unfairness Tex. Bus. & Comm Code §17.45 (13);
43. Defendant acted with such flagrant disregard of prudent and fair business practices to the extent that the defendant should be treated as having acted intentionally. Tex. Bus. & Comm Code §17.45 (13)

Application to Claims for Bodily Injury or Mental Anguish

44. The DTPA applies to claims for bodily injury and mental anguish to the extent set forth in § 17.50(b) and (h). Tex. Bus. & Comm. Code. §17.49(e).
45. Section 17.50(b) of the Texas Business and Commerce Code provides, in pertinent part, as follows:

(b) In a suit filed under this section, each consumer who prevails may obtain:

- (1) the amount of economic damages found by the trier of fact. If the trier of fact finds that the conduct of the defendant was committed knowingly, the consumer may also recover damages for mental anguish, as found by the trier of fact, and the trier of fact may award not more than three times the amount of economic damages; or if the trier of fact finds the conduct was committed intentionally, the consumer may recover damages for mental anguish, as found by the trier of fact, and the trier of fact may award not more than three times the amount of damages for mental anguish and economic damages;

Tex. Bus. & Comm. Code §17.50(b).

46. Thus, Plaintiff may recover:

- (a) her economic damages;

- (b) Since the Defendants acted knowingly, damages for mental anguish and three times the amount of economic damages;
 - (c) Since the Defendants acted intentionally, damage for mental anguish, three times the amount of economic damages, and three times the amount of damages for mental anguish.
47. Section 17.45 (11) of the Texas Business and Commerce Code defines economic damages as follows:
- (11) "Economic damages" means compensatory damages for pecuniary loss, including costs of repair and replacement. The term does not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society.
- Tex. Bus. & Comm. Code §17.45 (11). Thus Plaintiff may recover for her pecuniary loss, including the costs of repairing or replacing the hip prostheses.
48. Pecuniary loss includes money and everything that can be valued as money. *Kniep v. Unitedbank-Victoria*, 734 S.W.2d 130,134 (Tex. App.—Corpus Christi 1987, no writ).
49. Under section 17.50(b), Plaintiff can also recover for mental anguish damages as well as discretionary damages, since Defendants engaged in the complained of conduct either knowingly or intentionally.

Damages

50. Plaintiff suffered sustained and incurred, and in reasonable medical probability will suffer, sustain ad incur, the following injuries and damages as producing or proximate result (or both) of Defendants conduct, the defective hip prostheses, or both, among others:
- a. physical pain, past and future;
 - b. mental suffering, past and future;
 - c. physical disfigurement in the past and future;

- d. physical impairment in the past and future;
- e. reasonable and necessary medical expenses in the past and future;
- f. loss of earnings/earning capacity, past and future;
- g. reasonable and necessary attorneys' fees; and,
- h. costs of court.

Punitive Damages

As a basis for imposition of punitive damages on Defendants, Plaintiff says:

- 51. Plaintiff intends to prove by clear and convincing evidence that her injuries and damages, more particular set forth below, resulted from gross negligence.
- 52. The conduct of Defendant when viewed objectively from the standpoint of Defendant at the time of its occurrence involved an extreme degree of risk, considering the probably and magnitude of the potential harm to others.
- 53. Defendant had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscience indifference to the right, safety, or welfare of others.
- 54. The acts, omissions, or both, of Defendants that constituted gross negligence including one or more of the following, among others:
 - (a) designing, manufacturing, and marketing hip prostheses that are defective in that it has a high propensity of poor bone fixation to occur;
 - (b) designing, manufacturing and marketing a hip prosthesis that is defective in that it has a high propensity for wear and fracture of the prostheses to occur;
 - (c) failing to warn consumers in general, and Plaintiff or her physicians specifically, of the risk that the hip prostheses could become loose;

- (d) failing to adequately warn consumers in general and Plaintiff or her physicians specifically, of the risk that the knee prostheses could become loose;
- (e) failing to instruct consumers in general, and Plaintiff or her physicians specifically, of how to safely use the hip prostheses;
- (f) failing to adequately instruct consumers in general, and Plaintiff or her physicians specifically, of how to safely use the hip prostheses; and,
- (g) as more particularly set forth below, Plaintiff invokes the doctrine of *res ipsa loquitur*.

There was a high probability that the hip prostheses would become loose, resulting in a probability of serious injury.

55. Defendants knew of the above risk, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of consumers in general, and Plaintiff specifically.

Jury Demand

56. Plaintiff demands a jury trial.

Request for Relief

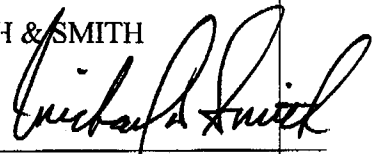
57. For these reasons, plaintiff requests judgment against defendants for:
- a. Compensatory damages in an amount above the minimum jurisdictional limits of the Court;
 - b. Punitive or exemplary damages in an amount above the minimum jurisdictional limits of the Court;
 - c. Pre-judgment interest according to Texas law;
 - d. Post-judgment interest according to Texas law
 - e. Costs of suit;

- f. Such other and further relief to which Plaintiff shows herself justly entitled to receive.

Respectfully submitted,

SMITH & SMITH

By:


Michael H. Smith
State Bar No. 00785005
Daniel J. Smith
State Bar No. 18557100
6300 Ridglea Place, Suite 617
Fort Worth, Texas 76116
(817) 877-5750
(817) 877-8899 (Fax)

ATTORNEYS FOR PLAINTIFF
GWENDOLYN LOPER

SMITH & SMITH

ATTORNEYS AT LAW
6300 RIDGLEA PLACE, SUITE 617
FORT WORTH, TEXAS 76116
(817) 877-5750
(817) 877-8899 (Fax)

June 24, 2010

Thomas A. Wilder
District Clerk Civil Division
Tim Curry Justice Center
401 W. Belknap
Fort Worth, Texas 76196

236 246337 10

Re: Cause No. _____ *Gwendolyn Loper v. Zimmer, Inc.*; _____ Judicial District Court,
Tarrant County, Texas

Dear Sir:

Enclosed please find an original and eight (8) copies of the following to be filed in the above-referenced matter:

1. Plaintiff's Original Petition and Jury Demand.

Please issue citations to Zimmer US, Inc. (paragraph 6) and notify this office when the citation is available for pick-up and service. Please issue a citation for the remaining three defendants for service by and through the Texas Secretary of State as instructed within the petition paragraphs 3, 4, and 5). In addition, please return a file-stamped copy of the petition in the envelope provided. Enclosed please find our company check for \$436.10 for one (1) filing fee at \$249, four (4) citations at \$8 per each, and three (3) service fees at \$51.70 per each. In addition, I have enclosed three checks, each in the amount of \$55, made payable to the Secretary of State.

Thank you for your cooperation in this matter. If you have any questions, please do not hesitate to call.

Sincerely,

Michael H. Smith
Michael H. Smith

MHS/sej
Encl.

06/24/10 (Date)
sent a copy of letter
To Doc prod *RR* (initials).

FILED
TARRANT COUNTY
2010 JUN 24 PM 1:45
THOMAS A. WILDER
DISTRICT CLERK

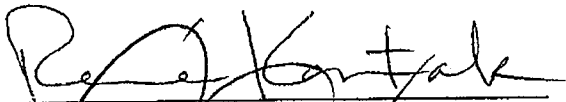
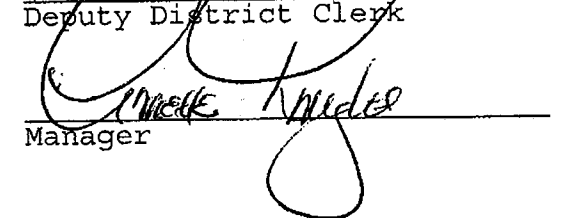
EXHIBIT 3

TARRANT COUNTY DISTRICT CLERK
OVERPAYMENT DISBURSEMENT REQUEST

CAUSE NUMBER 236-246337-10
TRANSACTION NUMBERS 11
DATE FUNDS RECEIVED 06/24/2010
METHOD OF PAYMENT CHECK
AMOUNT TO BE REFUNDED \$3.00
PAYEE MICHAEL H SMITH
ADDRESS OF PAYEE

6300 RIDGLEA PL, STE 617
FORT WORTH TX 76116

An overpayment of funds has been receipted in the cause number listed above. I have reviewed the case and determined that the overpayment should be refunded to the payee listed.


Deputy District Clerk

Manager

06/24/10
Date

6/24/10
Date

EXHIBIT 4

THE STATE OF TEXAS
DISTRICT COURT, TARRANT COUNTY

CITATION

Cause No. 236-246337-10

GWENDOLYN LOPER
VS.
ZIMMER, INC., ET AL

TO: ZIMMER US INC

B/S REG AGENT CORP SRV CO DBA CSC LAWYERS INC SRV 211 E 7TH ST STE 620 AUSTI
TX 78701-3218

You said DEFENDANT are hereby commanded to appear by filing a written answer to the PLAINTIFF'S ORIGINAL PETITION AND JURY DEMAND at or before 10 o'clock A.M. of the Monday next after the expiration of 20 days after the date of service hereof before the 236th District Court, 401 W BELKNAP, in and for Tarrant County, Texas, at the Courthouse in the City of Fort Worth, Texas, said PLAINTIFF being

GWENDOLYN LOPER

Filed in said Court on June 24th, 2010 Against
ZIMMER INC, ZIMMER HOLDINGS INC, ZIMMER PRODUCTION INC, ZIMMER US INC

For suit, said suit being numbered 236-246337-10 the nature of which demand is as shown on said PLAINTIFF'S ORIGINAL PETITION AND JURY DEMAND a copy of which accompanies this citation.

FILED
TARRANT COUNTY
2010 JUN -6 AM10:13
THOMAS A. WILDER
DISTRICT CLERK

MICHAEL H SMITH
Attorney for GWENDOLYN LOPER Phone No. (817)877-5750
Address 6300 RIDGLEA PL, STE 617 FORT WORTH, TX 76116

Thomas A. Wilder, Clerk of the District Court of Tarrant County, Texas. Given under my hand and the seal of said Court, at office in the City of Fort Worth, this the 25th day of June, 2010.

By Juanita Vega Deputy
JUANITA VEGA

NOTICE: You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 AM. on the Monday next following the expiration of twenty days after you were served this citation and petition, a default judgment may be taken against you.

Thomas A. Wilder, Tarrant County District Clerk, 401 W BELKNAP, FORT WORTH TX 76196-0402

OFFICER'S RETURN

Received this Citation on the _____ day of _____, _____ at _____ o'clock _____ M; and executed at _____ within the county of _____, State of _____ at _____ o'clock _____ M on the _____ day of _____, _____ by delivering to the within named (Def.): _____ defendant(s), a true copy of this Citation together with the accompanying copy of PLAINTIFF'S ORIGINAL PETITION AND JURY DEMAND, having first endorsed on same the date of delivery.

See Attached Return of Service

Authorized Person/Constable/Sheriff: _____
County of _____ State of _____ By _____ Deputy

Fees \$ _____
State of _____ County of _____ (Must be verified if served outside the State of Texas)
Signed and sworn to by the said _____ before me this _____ day of _____, _____
to certify which witness my hand and seal of office
(Seal)

County of _____, State of _____

236th District Court of TARRANT County, Texas

401 W. BELKNAP FORT WORTH TX 76196-0228

Case #: 23624633710

GWENDOLYN LOPER

Plaintiff

VS

ZIMMER, INC. ET AL

Defendant

AFFIDAVIT OF SERVICE

(Private Process)

I, Floyd J Boudreaux, make statement to the fact;
That I am a competent person more than 18 years of age or older and not a party to
this action, nor interested in outcome of the suit. That I received the documents
stated below on 06/29/10 11:03 am, instructing for same to be delivered upon Zimmer
Us Inc. By Delivering To Its Registered Agent Corporation Service Company.By
Delivering To Susan Vertrees Authorized To Accept.
That I delivered to : Zimmer Us Inc. By Delivering To Its Registered Agent Corporation
Service Company.By Delivering To Susan Vertrees Authorized To
Accept

the following : CITATION & PLAINTIFF'S ORIGINAL PETITION AND JURY DEMAND

at this address : 211 E 7th St Ste 620
Austin TX 78701

Manner of Delivery : by PERSONALLY delivering the document(s) to the person above.

Date and time : June 30, 2010 11:20 am

I SOLEMNLY AFFIRM under the penalties of perjury that the contents of the foregoing
paper are true and correct.

EXECUTED BY:

6-30-10
Date

Floyd J Boudreaux
Floyd J Boudreaux

Texas Certification#: SCH-3506

On this day Floyd J Boudreaux appeared before me, a notary public, and being duly
sworn by me stated that he/she has personal knowledge of the facts set forth in the
foregoing affidavit and declared that the facts contained therein are true and
correct. Given my hand and seal of office this 30 day of June 2010.

PCP Inv. #Z00600308
Private Process Server
Professional Civil Process Downtown
2211 IH 35 South #203 Austin TX 78741
(512) 477-3501

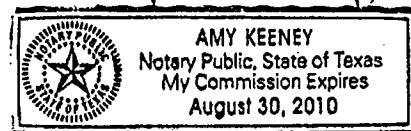


AX02Z00600308

jefferyc

+ Service Fee: 60.00
Witness Fee: .00
Mileage Fee: .00

Amy Keeney
NOTARY PUBLIC FOR THE STATE OF TEXAS



SMITH, MICHAEL H.

©

Professional Civil Process Downtown
2211 IH 35 South #203
Austin TX 78741
(512) 477-3501

Thomas A. Wilder
District Clerk of TARRANT County
401 W. Belknap
Fort Worth, TX 76196-0402

Cause# 23624633710
County TARRANT
Court 236

RE: Return of service
Service on: Zimmer Us Inc.

GWENDOLYN LOPER
VS
ZIMMER, INC. ET AL

Dear Thomas A. Wilder:

Enclosed please find:

- _____ Original Petition and copies.
- _____ Motion and Order under Rule 103 or 106.
- _____ Firm Check in the amount of .

Please do the following:

- ☒ Enclosed are returns of service and/or Declaration of Not Found Affidavits.
Please file back with the appropriate court.
- _____ Please file 103 or 106 and send conformed copy in a self addressed
stamped envelope.
- _____ Issue Citation(s) on Defendant(s) and forward to the Sheriff/
Constable for service, fees are enclosed for the service
- _____ Open case/issue/reissue citation(s) on defendant(s) and forward
the citation(s) back to our office. Envelope is enclosed.
- _____ Return (1) file stamped copy of Petition back to our office.
Envelope is enclosed.
- _____ Please forward back the Citation and Petition to our office and we
will forward the papers to the Sheriff to serve. Envelope is enclosed.

ATTN: DO NOT FORWARD TO ANOTHER COURT FOR FILING.

Thank you for your attention in this matter. Any Questions Please call
me at (800) 950-7493

Sincerely,

Amy Keeney

Z00600308

EXHIBIT 5

Cause Number 236-246337-1

GWENDOLYN LOPER
ZIMMER, INC., ET AL

VS

OFFICER'S RETURN

Received this Citation on the 25th day of June, 2010 at 10:29 AM; and executed at

To and through the Secretary Of State, Statutory Documents Section, P.O. Box 1209, Austin, Texas 78701-2079
 within the county of _____ State of DE on the 30th of June, 2010 by mailing to
 the within named ZIMMER PRODUCTION INC a true copy of this citation
 together with the accompanying copy of:
PLAINTIFF'S ORIGINAL PETITION AND JURY DEMAND

Authorized Person/Constable/Sheriff: Thomas A. Wilder

401 W BELKNAP

FORT WORTH TX 76196-0402

County of Tarrant, State of Texas

By: [Signature]

Deputy

Fees \$ 50.00

JUANITA VEGA

(Must be verified if served outside the State of Texas)

State of _____ County of _____

Signed and sworn to by the said _____ before this _____
 to certify which witness my hand and seal of office

U.S. Postal Service
CERTIFIED MAIL RECEIPT
 (Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com

DOCUMENT PRODUCTION USE

| | |
|--|----------|
| Postage | \$ 1.73 |
| Certified Fee | 2.88 |
| Return Receipt Fee (Endorsement Required) | 2.30 |
| Restricted Delivery Fee (Endorsement Required) | 6.83 |
| Total Postage & Fees | \$ 13.74 |

236-246337-10/Civil DP
 Zimmer Production Inc
 Sec State - Statutory Doc Sec
 1019 Brazos - P.O. Box 1209
 Austin, Tx 78701-

Postmark Here JUN 25 2010

USPS

Instructions

Tarrant, State of Texas

COMPLETE THIS SECTION

1, 2, and 3. Also complete
 and Delivery is desired.
 and address on the reverse
 turn the card to your
 space permits.

COMPLETE THIS SECTION ON DELIVERY

A. Signature ☒ Agent ☐ Addressee
X

B. Received by (Printed Name) C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
 If YES, enter delivery address below:

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☒ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes



23624633710000006

236-246337-10/Civil DP
 Zimmer Production Inc
 Sec State - Statutory Doc Sec
 1019 Brazos - P.O. Box 1209
 Austin, Tx 78701-

2. Article Number 7010 0290 001
 (Transfer from Service)

PS Form 3811, August 2001

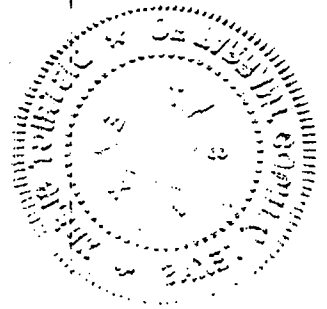
Domestic Return Receipt

102595-02-M-1540

FILED
 TARRANT COUNTY
 2010 JUL -8 AM 8:38
 THOMAS A. WILDER
 DISTRICT CLERK

TPASS/CPA
 JUN 30 2010

FILED
TARRANT COUNTY
2010 JUL -8 AM 8:38
THOMAS A. WILDER
DISTRICT CLERK



THE STATE OF TEXA
DISTRICT COURT, TARRANT ()UNTY

CITATION

Cause No. 236-246337-10

GWENDOLYN LOPER

VS.

ZIMMER, INC., ET AL

To and through the Secretary Of State, Statutory Documents Section, 1019 Brazos , PO Box 12079, Austin TX 78701-207
TO: ZIMMER PRODUCTION INC

2711 CENTERVILLER ROAD SUIT 400 WILMINGTON, DE 19808-

SERVICE OF PROCESS MAY BE HAD UPON DEFENDANT BY DELIVERING TO THE SECRETARY OF
COPIES OF THIS CITATION TOGETHER WITH DUPLICATE COPIES OF THE PLAINTIFF'S PETIT
You said DEFENDANT are hereby commanded to appear by filing a written answer to he PLAINTIFF'S ORIGINAL PETITION AND
JURY DEMAND at or before 10 o'clock A.M. of the Monday next after
the expiration of 20 days after the date of service hereof before the 236th Dis ict Court
, 401 W BELKNAP, in and for Tarrant County, Texas, at the Courthouse in the City of Fort Worth, Tarrant County, Texas
said PLAINTIFF being

GWENDOLYN LOPER

Filed in said Court on June 24th, 2010 Against
ZIMMER INC, ZIMMER HOLDINGS INC, ZIMMER PRODUCTION INC, ZIMMER US INC

For suit, said suit being numbered 236-246337-10 the nature of which demand is shown on said
PLAINTIFF'S ORIGINAL PETITION AND JURY DEMAND a copy of which accompanies this citation.

FILED
TARRANT COUNTY
2010 JUL -8 AM 8:35
DISTRICT CLERK
THOMAS A. WILDER

MICHAEL H SMITH

Attorney for GWENDOLYN LOPE Phone No. (817)877-5750
Address 6300 RIDGLEA PL, ST 617 FORT WORTH, TX 76116

Thomas A. Wilder , Clerk of the District Court of Tarrant County, Texas. Given under my hand and the seal
of said Court, at office in the City of Fort Worth, this the 25th day of June, 2010.

By Thomas A. Wilder Deputy
JUAN P. VEGA

NOTICE: You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the
clerk who issued this citation by 10:00 AM. on the Monday next following the e iration of twenty days after you were
served this citation and petition, a default judgment may be taken against you
Thomas A. Wilder, Tarrant County District Clerk, 401 W BELKNAP, F RT WORTH TX 76196-0402

OFFICER'S RETURN

Received this Citation on the _____ day of _____, _____ at _____ o'clock ____M; and executed at
_____ within the county of _____, _____ ate of _____ at _____ o'clock ____M
on the _____ day of _____, _____ by delivering to the within n ed (Def.): _____
defendant(s), a true copy of this Citation together with the accompanying copy of PLAINTIFF'S ORIGINAL PETITION AND
JURY DEMAND, having first endorsed on same the date of delivery.

Authorized Person/Constable/Sheriff: _____
County of _____ State of _____ By _____ Deputy

Fees \$ _____
State of _____ County of _____ (Must be v ified if served outside the State of Texas)
Signed and sworn to by the said _____ before n this _____ day of _____
to certify which witness my hand and seal of office
(Seal) _____
County of _____, St e of _____

CITATION

Cause No. 236-246337-10

GWENDOLYN LOPER

VS.

ZIMMER, INC., ET AL

ISSUED

This 25th day of June, 2010

Thomas A. Wilder
Tarrant County District Clerk
401 W BELKNAP
FORT WORTH TX 76196-0402

By JUANITA VEGA Deputy

MICHAEL H SMITH
Attorney for: GWENDOLYN LOPER
Phone No. (817)877-5750
ADDRESS: 6300 RIDGLEA PL, STE 617

FORT WORTH, TX 76116

CIVIL LAW

FILED
TARRANT COUNTY
2010 JUL -8 AM 8:35
THOMAS A. WILDER
DISTRICT CLERK



23624633710000006

EXHIBIT 6

Cause Number 236-246337- 0
 GWENDOLYN LOPER
 ZIMMER, INC., ET AL VS

OFFICER'S RETURN

Received this Citation on the 25th day of June, 20

at 10:23 AM; and executed at

To and through the Secretary Of State, Statutory Documents Section, P.O. Box 1
 within the county of State of DE on the 30th
 the within named ZIMMER HOLDINGS INC a true copy of this
 together with the accompanying copy of:
 PLAINTIFF'S ORIGINAL PETITION AND JURY DEMAND

79, Austin, Texas 78701-2079
 y of June, 2010 by mailing to
 Citation

Authorized Person/Constable/Sheriff: Thomas A. Wilder

401 W BELKNAP

FORT WORTH TX 76196-0402

County of Tarrant, State of Texas

By Juanita Vega Deputy

Fees \$ 50.00

JUANITA VEGA

(Must be verified if served outside the State of Texas)

State of TEXAS County of Tarrant

Signed and sworn to by the said Juanita Vega before this 7-8-10
 to certify which witness my hand and seal of office

FILED
 TARRANT COUNTY
 2010 JUL -8 AM 8:47
 THOMAS A. WILDER
 DISTRICT CLERK

U.S. Postal Service
 CERTIFIED MAIL RECEIPT
 (Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com

DOCUMENT PRODUCTION USE

Postage \$ 1.90
 Office Fee
 Return Fee
 (Endorsement Required)
 Registered Mail Fee
 (Endorsement Required)
 Total Postage & Fees \$
 236-246337-10/Civil DP
 Zimmer Holdings, Inc
 Sec State - Statutory Doc Sec
 1019 Brazos - P.O. Box 1209
 Austin, Tx 78701-

da Damer
 Tarrant, State of Texas

COMPLETE THIS SECTION

Items 1, 2, and 3. Also complete
 Restricted Delivery is desired.
 name and address on the reverse
 can return the card to you.
 back to the back of the envelope.
 to the back of the envelope.

to:

COMPLETE THIS SECTION ON DELIVERY

A. Signature
 X ☐ Agent
☐ Addressee
 B. Received by (Printed Name)
 C. Date of Delivery
 D. Is delivery address different from item 1? ☐ Yes
 If YES, enter delivery address below: ☐ No

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☒ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number

(Transfer from service label)

7010 0

PS Form 3811, August 2001

Domestic

90 0001 3391 9627

Return Receipt

102595-02-M-1540

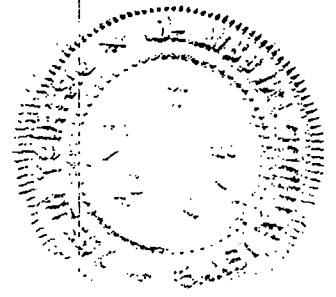
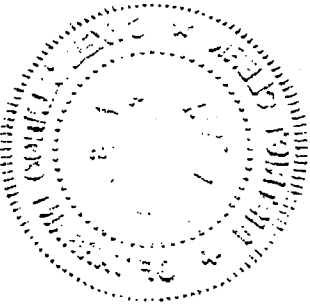


23624633710000005

7010 0290 0001 3391 9627

2010 JUL -8 AM 8:47
 THOMAS A. WILDER
 DISTRICT CLERK

FILED
TARRANT COUNTY
2010 JUL -8 AM 8:47
COURT CLERK
DISTRICT CLERK



County of _____, State of _____

CITATION

Cause No. 236-246337-10

GWENDOLYN LOPER

VS.

ZIMMER, INC., ET AL

ISSUED

This 25th day of June, 2010

Thomas A. Wilder
Tarrant County District Clerk
401 W BELKNAP
FORT WORTH TX 76196-0402

By JUANITA VEGA Deputy

MICHAEL H SMITH
Attorney for: GWENDOLYN LOPER
Phone No. (817)877-5750
ADDRESS: 6300 RIDGLEA PL, STE 617

FORT WORTH, TX 76116

CIVIL LAW

FILED
TARRANT COUNTY
2010 JUL -8 AM 8:40
THOMAS A. WILDER
DISTRICT CLERK



23624633710000005

EXHIBIT 7

Cause Number 236-246337-10

GWENDOLYN LOPER
ZIMMER, INC., ET AL

VS

OFFICER'S RETURN

Received this Citation on the 25th day of June, 20 at 10:30 AM; and executed at

To and through the Secretary Of State, Statutory Documents Section, P.O. Box 179, Austin, Texas 78701-2079
 within the county of State of IN on the 30th y of June, 2010 by mailing to
 the within named ZIMMER INC a true copy of this Citation
 together with the accompanying copy of:
 PLAINTIFF'S ORIGINAL PETITION AND JURY DEMAND

Authorized Person/Constable/Sheriff: Thomas A. Wilder
 401 W BELKNAP
 FORT WORTH TX 76196-0402

County of Tarrant, State of Texas

By: Linda Davidson Deputy

Fees \$ 50.00

LINDA DAVIDSON

(Must be verified if served outside the State of Texas)

State of TEXAS County of Tarrant
 Signed and sworn to by the said Linda Davidson before e this 7-8-10
 to certify which witness my hand and seal of office

U.S. Postal Service
CERTIFIED MAIL RECEIPT
 (Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com

OFFICIAL USE

Postage \$ 1.73

Certified Fee 2.88

Reason Receipt Fee (Endorsement Required)

Restricted Delivery Fee (Endorsement Required)

236-246337-10/Civil DP

Zimmer Inc

Sec State - Statutory Doc Sec

1019 Brazos - P.O. Box 1209

Austin, Tx 78701-

Instructions

236-246337-10/Civil DP

Zimmer Inc

Sec State - Statutory Doc Sec

1019 Brazos - P.O. Box 1209

Austin, Tx 78701-

23624633710000007

236-246337-10/Civil DP
 Zimmer Inc
 Sec State - Statutory Doc Sec
 1019 Brazos - P.O. Box 1209
 Austin, Tx 78701-

2. Article Number 7010 0290 0
 (Transfer from service tape)
 PS Form 3811, August 2001

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X

☐ Agent☐ Addressee

B. Received by (Printed Name)

C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
 If YES, enter delivery address below: ☐ No

3. Service Type

☒ Certified Mail☐ Express Mail☐ Registered☒ Return Receipt for Merchandise☐ Insured Mail☐ C.O.D.

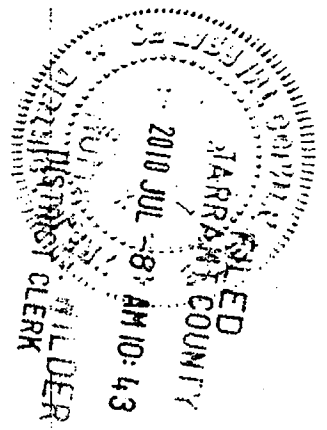
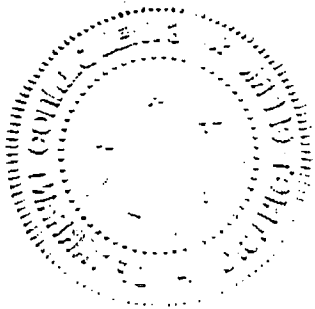
4. Restricted Delivery? (Extra Fee)

☐ Yes

01 3391 9641

Postic Return Receipt

102595-02-M-1540



Fees \$ _____
State of _____ County of _____ (Must be verified if served outside the State of Texas)
Signed and sworn to by the said _____ before me this ____ day of _____,
to certify which witness my hand and seal of office
(Seal) _____

CITATION

Cause No. 236-246337-10

GWENDOLYN LOPER

VS.

ZIMMER, INC., ET AL

ISSUED

This 25th day of June, 2010

Thomas A. Wilder
Tarrant County District Clerk
401 W BELKNAP
FORT WORTH TX 76196-0402

By JUANITA VEGA Deputy

MICHAEL H SMITH
Attorney for: GWENDOLYN LOPER
Phone No. (817)877-5750
ADDRESS: 6300 RIDGLEA PL, STE 617

FORT WORTH, TX 76116

CIVIL LAW

FILED
TARRANT COUNTY
2010 JUL -8 AM 10:43
THOMAS A. WILDER
DISTRICT CLERK



236246337100000007

EXHIBIT 8

NO. 236-246337-10

GWENDOLYN LOPER,

PLAINTIFF,

v.

ZIMMER, INC., ZIMMER HOLDINGS,
INC., ZIMMER US, INC. AND ZIMMER
PRODUCTION, INC.,

DEFENDANTS.

§
§
§
§
§
§
§
§
§
§

IN THE DISTRICT COURT OF

TARRANT COUNTY, TEXAS

236TH JUDICIAL DISTRICT

FILED
TARRANT COUNTY
2010 JUL 23 PM 3:19
THOMAS A. WILDER
DISTRICT CLERK

DEFENDANTS' ORIGINAL ANSWER TO PLAINTIFF'S ORIGINAL PETITION

Defendants ZIMMER, INC., ZIMMER HOLDINGS, INC., ZIMMER US, INC. and ZIMMER PRODUCTION, INC., (hereinafter "Defendants") file their Original Answer to Plaintiff's Original Petition and would show as follows:

I.
GENERAL DENIAL

1. Defendants assert a general denial of the allegations of Plaintiff's pleadings, as authorized by TEXAS RULE OF CIVIL PROCEDURE 92, and respectfully request that Plaintiff be required to prove the charges and allegations against Defendants by a preponderance of the evidence, as is required by the Constitution and laws of the State of Texas.

II.
AFFIRMATIVE DEFENSES

2. Defendant Zimmer Holdings, Inc. is not a proper party to this lawsuit as it did not design, manufacture or distribute the products at issue.

3. Defendant Zimmer US, Inc. is not a proper party to this lawsuit as it did not design, manufacture or distribute the products at issue.

4. Defendant Zimmer Production, Inc. is not a proper party to this lawsuit as it did not design, manufacture or distribute the products at issue.

5. Defendants affirmatively plead the doctrines of contributory negligence, comparative responsibility, and proportionate responsibility.

6. Under the facts, the Court should instruct the jury on sole, new and independent, superseding and/or intervening proximate and/or producing cause.

7. Defendants assert their rights of contribution and indemnity under Texas law with respect to any settling person, responsible party or tortfeasor. *See* Chapter 33 of the TEXAS CIVIL PRACTICE AND REMEDIES CODE.

8. Defendants invoke all protections contained within Chapter 41 of the TEXAS CIVIL PRACTICE AND REMEDIES CODE. As a consequence:

a. Plaintiff may not be awarded exemplary damages unless she establishes by clear and convincing evidence that Defendants acted with malice, which Defendants deny. TEX. CIV. PRAC. & REM. CODE ANN. § 41.003. Defendants further request that the jury be instructed as required by TEXAS CIVIL PRACTICE & REMEDIES CODE § 41.012 with respect to any claim for exemplary damages, assuming such a claim should be submitted to the jury, which Defendants deny.

b. In the unlikely event of any exemplary damage award, Defendants further invoke the provisions of TEXAS CIVIL PRACTICE & REMEDIES CODE § 41.008 limiting any award of exemplary damages to either \$200,000.00 or two times the amount of "economic damages," as defined by statute, plus an amount equal to any non-economic damages found by the jury, but not to exceed \$750,000.00.

9. If the Plaintiff sustained injuries or incurred expenses as alleged, her injuries or expenses were caused in whole or in part by the conduct of one or more persons or entities for whose conduct Defendants were not responsible and with whom Defendants have no legal connection.

10. Any amount that Plaintiff claims as compensatory damages, if the claims for such amounts are not entirely barred, must be diminished proportionately by the fault of Plaintiff and the fault of all others who caused or contributed to cause the harm.

11. If the Plaintiff sustained injuries or incurred expenses as alleged, her injuries or expenses were the result of intervening and/or superseding causes, and not as a result of Defendants' acts or omissions.

12. The Plaintiff cannot recover under the Petition because Defendants complied with all applicable codes, standards, regulations, or specifications established, adopted, promulgated, or approved by the United States, State of Texas, or by an agency of the United States or Texas.

13. The Plaintiff's claims are barred by virtue of the intervention of a learned intermediary or intermediaries to whom Defendants discharged their duty to warn.

14. The Plaintiff assumed the risk of any damages alleged in the Petition.

15. If the Plaintiff sustained injuries or incurred expenses as alleged, her injuries or expenses were caused by a misuse and/or modification or alteration of the products, and the misuse and/or modification or alteration was not reasonably expected by Defendants.

16. The Plaintiff cannot recover under the Petition because products at issue were in conformity with the generally recognized state of the art at the time they were designed, manufactured, packaged, and labeled.

17. The products at issue are prescription medical devices that are reasonably safe because reasonable health care providers prescribe the devices for a class of patients, knowing the devices' foreseeable risks and therapeutic benefits.

18. The products in question are medical devices and thus governed by the provisions of the Texas Product Liability Act. TEX. CIV. PRAC. & REM. CODE § 82 (the "Act"). Defendants are entitled to all applicable presumptions and defenses under the Act.

19. Plaintiff's claims are barred in whole or in part because Defendants provided adequate "direction or warnings" as to the use of any of the products in question within the meaning of comment to Section 402A of the Restatement (Second) of Torts.

20. Plaintiff's claims under the Texas Deceptive Trade Practices Act are barred in whole or in part because of the exemption contained in Section 17.49(e) of the TEXAS BUSINESS AND COMMERCE CODE.

21. Defendants assert the products at issue are neither defective nor unreasonably dangerous because they are products which falls within the "comment k exception" to strict tort liability defined in Section 402A of the Restatement (Second) of Torts.

22. Unless Defendants' alleged liability for punitive damages and the appropriate amount of punitive damages is required to be established by clear and convincing evidence, any award of punitive damages would violate Defendants' due process rights guaranteed by the Fourteenth Amendment to the United States Constitution and by the due process provisions of the Texas Constitution, and would be improper under the common law and public policies of the State of Texas.

23. Plaintiff's claim for punitive damages against Defendants cannot be sustained, because an award of punitive damages under Texas law subject to no predetermined limit, such

as a maximum multiple amount of compensatory damages or a maximum amount on the amount of punitive damages that a jury may impose, would violate Defendants' due process rights guaranteed by the Fourteenth Amendment to the United States Constitution and by the due process provisions of the Texas Constitution and would be improper under the common law and public policies of the State of Texas.

24. Plaintiff's claim for punitive damages against Defendants further cannot be sustained because an award of punitive damages under applicable law by a jury that (1) is not provided standards of sufficient clarity for determining the appropriateness, and the appropriate size, of a punitive damages award, (2) is not adequately instructed on the limits of punitive damages imposed by the applicable principles of deterrence and punishment, (3) is not expressly prohibited from awarding punitive damages, or determining the amount of an award of punitive damages, in whole or in part, on the basis of discriminatory characteristics, including the residence, wealth, and corporate status of Defendants, (4) is permitted to award punitive damages under a standard for determining liability for punitive damages that is vague and arbitrary and does not define with sufficient clarity the conduct or mental state that makes punitive damages permissible, and (5) is not subject to trial court and appellate judicial review for reasonableness and furtherance of legitimate purposes on the basis of objective standards, would violate Defendants' due process and equal protection rights guaranteed by the Fourteenth Amendment to the United States Constitution and by the due process and equal protection provisions of the Texas Constitution and would be improper under the common law and public policies of the State of Texas.

25. Plaintiff's claims are pre-empted, in whole or in part, by federal laws and regulations, including, without limitation, those governing the labeling, advertisement and sale of medical devices.

26. Plaintiff's claims may be barred, in whole or in part, by the doctrines of estoppel, unclean hands, waiver and regulatory compliance.

27. Plaintiff's claims may be barred, in whole or in part, by the doctrines of res judicata, collateral estoppel, issue preclusion and/or claim preclusion.

28. Plaintiff failed to properly mitigate her damages, if any.

29. Plaintiff's injuries, if any, were caused or enhanced by a preexisting medical, genetic, and/or environmental condition of Plaintiff unrelated to the products at issue in this case.

30. There is no causal relationship between the acts alleged and the damages alleged.

31. The benefits of the products at issue outweigh the risks, if any, which may be attendant to their use.

32. To the extent Plaintiff is seeking recovery for benefits entitled to be received or actually received from any other source for injuries alleged in the Petition, such benefits are not recoverable in this action.

33. To the extent Plaintiff relies upon any theory of breach of warranty, Plaintiff did not rely on such warranties and the claims are otherwise barred for lack of timely notice, lack of privity and/or because the alleged warranties were disclaimed.

34. Plaintiff cannot recover mental anguish damages because Plaintiff's claim is for bodily injury and Defendants did not act knowingly or intentionally.

35. Defendants reserve the right to assert any other additional or affirmative defenses and claims of avoidance as may be appropriate based upon the facts and issues disclosed during the course of additional investigation and discovery.

III.
JURY DEMAND

36. Defendants request a trial by jury as is their right under the laws of Texas.

WHEREFORE, PREMISES CONSIDERED, Defendants respectfully request that Plaintiff take nothing and that all costs of court be taxed against Plaintiff. Defendants further request all such other relief to which they may be entitled.

Respectfully submitted,

FULBRIGHT & JAWORSKI L.L.P.




KATHERINE P. LETT
State Bar No. 24007548
2200 Ross Avenue, Suite 2800
Dallas, Texas 75201-2784
Telephone: 214.855.8000
Facsimile: 214.855.8200

**COUNSEL FOR DEFENDANTS ZIMMER,
INC., ZIMMER HOLDINGS, INC.,
ZIMMER US, INC. AND ZIMMER
PRODUCTION, INC.**

CERTIFICATE OF SERVICE

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